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Nos. 00-568 and 00-809

MOTION FILED

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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Pennsylvania Public Utility Commission (Commission) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case, having failed to secure the consent of all parties.

There are a large number of parties in this case. The consent of all parties was sought by letter dated May 17, 2001 forwarded to each party on the Court's official docket list by overnight courier or United States Express Mail.

As of the date of the printing of this brief, 58 parties have consented and none have refused consent. Four requests were returned as undeliverable and 65 parties have not responded to our request as of the printing date of this brief.

The interest of the Commission in this proceeding is as a State agency which, pursuant to State legislation, has restructured its electric industry for the purpose of introducing retail competition, and which views the Federal Energy Regulatory Commission Order under attack as vital to the success of retail competition and the economic health of the Mid-Atlantic region. The Commission's views are not adequately represented by petitioners, respondents or other parties. It is believed that the views contained herein will provide more complete view of the Constitutional and statutory issues involved.

Respectfully submitted,

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QUESTION PRESENTED IN NO. 00-568

Whether, given that Congress in 1935 stated that federal regulation extends "only to those matters which are not subject to regulation by the states" (Section 201(a) of Federal Power Act), and transmission of energy from generators to retail customers in the same State was then "subject to regulation by states" (as it has been since 1935), may FERC preempt State jurisdiction over such intrastate retail transmissions of electric energy?

QUESTIONS PRESENTED IN NO. 00-809

Whether the Federal Energy Regulatory Commission (FERC) has jurisdiction under the Federal Power Act (FPA), 16 U.S.C. §§ 798 *et seq.*, to regulate all transmission of electric energy in interstate commerce, including interstate transmission of electric energy that is sold to retail customers at a "bundled" price?

Whether FERC had jurisdiction and the obligation under the FPA to eliminate pervasive "undue discrimination" in the provision of interstate electric energy transmission services by requiring transmission-owning utilities to provide interstate transmission services on the same terms to all users, for all interstate transmissions, including transmissions bundled with retail sales?

Whether the court of appeals erred in ruling that FERC had discretion to interpret the FPA as denying FERC the necessary jurisdiction to remedy the undue discrimination it had found in the provision of interstate transmission?

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STATEMENT OF *AMICUS* INTEREST [1]

The Pennsylvania Public Utility Commission is a State administrative commission created by the General Assembly of the Commonwealth of Pennsylvania and is charged with the regulation of electric utilities and licensing of generation suppliers within the Commonwealth of Pennsylvania. 66 Pa.C.S. § 101, *et seq*. The Commonwealth of Pennsylvania continues to be involved in the restructuring of the Commonwealth's retail electric energy industry pursuant to the Commonwealth's *Electricity Generation Customer Choice and Competition Act*, 66 Pa.C.S. § 2801-2812 ("Pennsylvania Electric Competition Act"). Since January 2, 2000, nearly all retail electric customers in the Commonwealth have had the right to select a competitive retail electric generation supplier according to the terms of the Pennsylvania Electric Competition Act. As the success of the retail electric market is dependent upon a well-functioning regional wholesale generation market, the Commission urges this Court to sustain the orders below. FERC's conclusion that the Federal Power Act requires interstate transmission service to be provided on the same terms and conditions for all is in accord with law and Congressional intent. The Pennsylvania Commission supports FERC's orders[2] carrying

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[1] Rule 37.6 Statement: John A. Levin, Assistant Counsel to the Pennsylvania Public Utility Commission, is the author of this brief. No person or entity other than the Pennsylvania Public Utility Commission has made a monetary contribution to the preparation or submission of this brief.

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888*, F.E.R.C. Stats. & Regs. ¶31,036 (1996), *order on reh'g, Order No. 888-A*, F.E.R.C. Stats. & Regs. ¶ 31,048 (1997), *order on reh'g, Order No. 888-B*, 81 F.E.R.C. ¶61,248 (1997), *order on reh'g, Order No. 888-C*, 82 F.E.R.C. ¶61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group, et al. v. F.E.R.C.*, 225 F.3d 667

out the intent of Congress's enactment of the Energy Policy Act of 1992. FERC's jurisdiction over the provision of interstate transmission service under the Federal Power Act does not change whether the power to be transmitted is carried to a State which permits retail electric competition or to a State which continues to regulate bundled retail service in traditional fashion. A State may not, under the guise of local regulation, place an undue burden upon interstate commerce and the interstate transmission system.

SUMMARY OF ARGUMENT

This Court determined, in *Rhode Island PUC v. Attleboro Steam*, 273 U.S. 83 (1927) that interstate electric transmission service could not lawfully be regulated by the States based upon repugnance of such regulation to the Commerce Clause. U.S. Const. Art. 1, § 8, cl. 3. In the intervening years, it became apparent to Congress that there was an important regulatory gap created by the unregulated growth of the electric system across State lines, accompanied by changes in technology. Congress's response was to fill the regulatory gap eight years later by passage of the Federal Power Act of 1935, 16 U.S.C. §§ 792 *et seq.*. Through the Federal Power Act, the federal government assumed jurisdiction over the rates, rules and regulations of bulk power sales and interstate transmission, while the States regulated the provision of intrastate transmission service then associated with the bundled retail sales of electricity to end users. This regulatory paradigm remained more or less static until 1992.

In 1992, Congress passed the Energy Policy Act of 1992 (EPAct), containing provisions codified at 16 U.S.C. §§ 824j-824m introducing open access to the transmission grid and

(D.C. Cir. 2000), *pet. for cert granted sub nom. People of the State of New York v. F.E.R.C.*, No. 00-568 and *Enron Power Marketing, Inc. v. F.E.R.C.* (Order No. 888), __ U.S. __, 149 L. Ed. 102, 121 S. Ct. 1185 (U.S. 2001) (*Order 888*).

competition to wholesale generation markets. The creation of wholesale competition provided the necessary predicate to retail competition. Orders 888, challenged here by both Petitioners New York and Enron, was FERC's comprehensive implementation of the regulatory changes wrought by EPAct.

As a State that has been among the leaders in the introduction of retail electric competition[3], Pennsylvania has an important stake in the wholesale generation market protections created by FERC Orders 888 and 889. An interstate transmission system riddled with "holes" or "blockades" created by the erection of local State rules seeking to protect "native" bundled retail load would be injurious to interstate commerce, retail competition, regional reliability and at odds with Congressional intent.

The electric transmission grid of 1928 or 1935 or 1992 is not the electric transmission grid of today. Industries can and do grow from localized markets with little effect on interstate commerce to national markets spanning many or all states. Wholesale generation markets are becoming increasingly regional and multi-state in character. FERC's reorganization of transmission under "Open Access Transmission Tariffs" and the control of Independent System Operators and

[3] Of 1.2 million customers eligible to shop for competitive retail power in Pennsylvania in March, 1999, 400,000 had actually switched, about 33 percent of peak winter load. Testimony of John M. Quain, Chairman, Pennsylvania Public Utility Commission, *Evolving Federal and State Roles, Hearings before the House Subcommittee on Energy and Power*, 106th Congress at 91 (March 18, 1999) As of October 2000, more than 550,000 Pennsylvania customers were purchasing power from a competitive supplier. In 1997, retail rates were on average 15% higher than elsewhere in the United States. In February, 2001, Pennsylvania rates were 4.4% lower on average. Testimony of John M. Quain, Chairman, Pennsylvania Public Utility Commission, *Electricity Markets, Hearings before the House Subcommittee on Energy and Air Quality*, 107th Congress at 91 (February 15, 2001)

Regional Transmission Organizations are both a reflection and a necessary facilitator of this trend. Regional markets cannot effectively operate where individual states are permitted to carve out portions of the common grid in promotion of local policies or local industries. Congress cannot be presumed to have opened up the transmission grid to competition through the enactment of EPAct, only to see its policy chopped apart by individual States or the political subdivisions of States seeking to advance local parochial interests under the guise of the exercise of "traditional police powers".

ARGUMENT

I. ORDER 888 AND THE EXERCISE OF STATUTORY AND FEDERAL COMMERCE CLAUSE AUTHORITY BY FERC IS SUPPORTED BOTH BY LAW AND BY CHANGES IN THE NATIONAL TRANSMISSION SYSTEM

A. The Legislative History of The Federal Power Act and the Energy Policy Act of 1992 Demonstrates That Congress Intends to Create a Vibrant Wholesale Generation Market

Transmission facilities, prior to EPAct, were universally operated by and for the benefit of the vertically integrated monopoly owners of such facilities. The provisions of the Federal Power Act were crafted by Congress to encourage voluntary, not mandatory, interconnections of transmission networks. *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973). As this Court noted in *Otter Tail:*

> As originally conceived, Part II would have included a "common carrier" provision making it "the duty of every public utility to . . . transmit energy for any person upon reasonable request . . ." In addition, it would have empowered the Federal Power Commission to order wheeling if it found such action to be "necessary or desirable in the public interest." H. R. 5423, 74th Cong., 1st Sess.; S. 1725, 74th Cong., 1st Sess. These provisions were eliminated to preserve "the voluntary action of the utilities." S. Rep. No. 621, 74th Cong., 1st Sess., 19. It is clear, then, that Congress rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.

Otter Tail, at 374.

Although the then-existing provisions of Section 202 of the Federal Power Act, 16 U.S.C. § 824a, authorized FERC's predecessor, the Federal Power Commission (FPC), after hearing, to order interconnections between transmission facilities, this provision was generally interpreted as authority to require interconnections between utilities, not as authority to force utilities to act as common carriers.

Even so, this Court found it within the FPC's powers in 1952 to compel a Pennsylvania electric utility to continue its existing interconnection arrangement with a Maryland utility for the benefit of Maryland retail consumers, even "notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary." *Pennsylvania Water & Power Co. v. F.P.C.,* 343 U.S. 414 at 420 (1952), *citing, Pennsylvania Water & Power Co.,* 8 F.P.C. 1, 37 (1949). It should be noted that while *U.S. v. Public Utilities Commission of California,* 345 U.S. 295 (1952) usefully summarizes the intent of Congress with regard to the Federal / State jurisdictional issues prior to 1952, it and similar federal/state jurisdictional cases no longer control this case because of the enactment of EPAct in 1992.

EPAct signalled the intent of Congress that a sharp departure was to be made in the method and scope of regulation of the interstate transmission grid. The language of Title VII, Section 721 of EPAct, 16 U.S.C. § 824j, was a revolution in electric transmission regulation. For the first

time since the start of the electric power industry, any person could request transmission service to convey power from one point to another point for resale. This statutory provision was the launch by Congress of a wholesale electric generation market in the United States which implicitly encouraged, but did not require a parallel development by the States of a competitive retail generation market. It is indeed difficult to conceptualize any development of electric retail competition without a preexisting wholesale generation market. By permitting non-utility generation providers access to the grid, Congress was also encouraging an end to the traditional vertically integrated electric utility monopoly that had been the unchallenged United States model for most of the 20th century.

EPAct Title VII contained other important provisions. Section 711 of EPAct amended the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 32, to create a new purely wholesale generation entity, the "exempt wholesale generator" which, subject to FERC review, would be exempt from the regulatory provisions of PUHCA. Thus Congress created a new kind of market participant for the new competitive wholesale generation market—exempt wholesale generators, free of geographic restrictions and monopoly utility control that would compete with incumbent monopoly generation and bring about market based prices and market reform.

The provision upon which New York principally relies, EPAct § 722, amends Section § 212 of the Federal Power Act by the addition of subsections (g)-(k), specifically subsection (h) "Prohibition on Mandatory Retail Wheeling and Sham Wholesale Transactions", 16 U.S.C. § 824k (h). The context of this subsection indicates Congress's overarching intent to create a wholesale generation market in interstate transmission of electricity while giving States flexibility to create retail electric competition or not, as each State

determined to be its policy. If States wish to introduce retail competition, EPAct creates the required wholesale generation market infrastructure. If not, States cannot be forced, through a Section 212 interconnection order to open up their retail markets to competition.

Congress never intended to and did not grant States the power to defeat Congress's creation of a wholesale transmission market by interposing parochial State burdens on the portions of the transmission grid which happened to be located in that State. While reserving to the States their preexisting power to regulate jurisdictional monopoly retail electric utility service as States had for most of the 20th Century, Congress did not intent to cede any of its jurisdiction over interstate transmission. Congress had no intent to impair the national wholesale electric generation market which it had created with the same stroke of the pen.

New York's *Brief on the Merits* erroneously conflates State ratemaking powers with rules controlling the operation of the interstate transmission network. Transmission rates are actually a relatively small component of retail electric rates. It is clear from New York's argument (and even more so from the novel theory advanced by California as *amicus curiae)* that retail rates are not the issue here. Network control and "rules of the road" are what is being fought over. Who controls the interstate grid gets to decide a great many things, including wholesale generation market design and which wholesale electricity transactions will flow and which will be cut or reduced.

Thus, New York's position that the matter before you is really a rate case and its citation of *Duquesne Light and Penn Power v. Barasch*, 488 U.S. 299 (1989) in support of that proposition is ironic in two respects.

First it is a *non sequitur*. The issues in this case clearly do not involve public utility rates or a claim that FERC has engaged in an unconstitutional "taking" of utility property, a

claim which New York would lack standing to advance in any event. In *Duquesne*, two Pennsylvania utilities challenged a Pennsylvania ratemaking statute involving State laws governing the valuation of *intra*state generation assets for State ratemaking purposes. Second, as this Court recognized in *Duquesne*, when utility regulatory schemes change, states must fairly adjust their rules and methods of regulation to accommodate such changes.

> The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. But the instant case does not present this question.

Duquesne at 315.

Here, "methodologies" have clearly changed, at Congress's behest. New methodologies of participation and cooperation are necessary, both on FERC's behalf and on behalf of the States to ensure that the growing wholesale generation market in electricity generation is not hampered or destroyed by fragmentation of jurisdiction over the transmission grid.

In its *Brief for Respondents* in No. 00-809 New York cites to the decision of the Eighth Circuit in *Northern States Power v. F.E.R.C.*, 176 F.3d 1090 (CA 8th Cir. 1999), *cert. den sub nom. Enron Power Marketing Inc. v. Northern States Power Co.*, 528 U.S. 1182 (2000) for the principle that Congress intended that a State has jurisdiction to protect its "native load" customers by ordering that they receive preferential transmission service, whether or not that burdened interstate commerce. That decision is manifestly erroneous and this

Court should expressly overrule it. *See* William H. Penniman and Paul B. Turner, *A Jurisdictional Clash over Electricity Transmission: Northern States Power v. F.E.R.C.*, 20 Energy L. J. 205 (1999).

B. The Development of Pennsylvania Retail Competition Is Based Upon A Vibrant Wholesale Generation Market and An Interstate Grid Not Controlled by Parochial Local Interests

Prior to 1997, and the start of retail competition in the Commonwealth of Pennsylvania, the Pennsylvania Commission shared many of the views on jurisdiction presently being advanced by New York. The Pennsylvania Commission participated in the rulemaking proceedings that led to the issuance of Order 888, and in our May 23, 1996 petition for rehearing, the Pennsylvania Commission told FERC that it lacked jurisdiction to redefine its jurisdiction over interstate transmission in the manner that it ultimately did. At that time, none of the States had any actual experience with retail competition made possible by the existence of a nascent wholesale generation market. Pennsylvania's extensive and actual experience with the operation of competitive wholesale and retail generation markets has been the basis of a major evolution of our perspective.

The Pennsylvania Electric Competition Act was signed into law on December 3, 1996 and became effective January 1, 1997, contemporaneously with the development of the open access rules being developed in FERC's *Order 888* proceeding. The concepts and mechanisms being advanced by FERC in its *Order 888* rulemaking, particularly those provisions that sought to create a national wholesale generation market and transmission system free of undue discrimination or market power, played a central role in the development and eventual passage of the Pennsylvania Electric Competition Act.

The Pennsylvania Electric Competition Act was drafted contemporaneously with FERC's restructuring of the national wholesale generation markets through its Order 888 rulemaking and reflects FERC's restructuring efforts. For example, Pennsylvania legislative findings at 66 Pa.C.S. §2802 (1), (3), (5), (13), (15), (19) and (20) note recent changes in Federal law and policy which restructured previously regulated industries to competitive markets. 66 Pa.C.S. § 2802 (19) encourages all market participants to coordinate plans and transactions through a [FERC approved] independent system operator or functional equivalent.

66 Pa.C.S. § 2803 defines "direct access" as "the right of electric generation suppliers and end-use customers to utilize and interconnect with the electric transmission and distribution system on a nondiscriminatory basis at rates, terms and conditions of service comparable to the transmission and distribution companies' own use of the system to transport electricity from any generator of electricity to any end-use customer", a standard comparable to FERC's "open access" standard in Order 888. All of these provisions reflect Pennsylvania's reliance on the Federal restructuring rules embodied in *Order 888*.

The Pennsylvania Commission, assigned by the Pennsylvania General Assembly the task of implementing the Pennsylvania Competition Act, relied heavily upon the interstate transmission and wholesale generation market restructuring process that FERC has undertaken in *Order 888*, particularly with respect to FERC's guarantee of open access to the regional transmission grid to all wholesale generation market participants. *Electric Utility Restructuring Filings Made Pursuant to 66 Pa.C.S. § 2806(E)*, 176 PUR 4th 45 (Pa.P.U.C. 1997). A major concern of Pennsylvania was that "Electric industry restructuring should ensure the reliability of the interconnected electric system by maintaining the efficiency of the transmission and distribution system." *Id.* at 49, *citing* 66 Pa. C.S. §2802 (12).

Most of Pennsylvania's transmission grid is under the operational control of one of the nation's first independent system operators, created by FERC pursuant to the "open access" principles of *Order 888*[4]. PJM Interconnection, L.L.C. (PJM) controls the transmission facilities of nine transmission owning companies in the States of Pennsylvania, New Jersey, Maryland, Delaware and the District of Columbia. PJM's Open Access Transmission Tariff, as approved by FERC, permits anyone in the PJM region, upon joining PJM and signing its agreements to transport electric energy for resale over PJM controlled transmission facilities and pay a single networked tariff.

Market based wholesale generation pricing authority has been granted by FERC to numerous participants in the PJM region, including generation owners which also own or control transmission facilities. Such market pricing authority has been granted expressly *because* market power concerns have been adequately addressed by PJM's independent control of the region's transmission facilities. *Order Approving PJM Supporting Companies' Request for Market-Based Pricing Authority*, 86 F.E.R.C. ¶ 61,248 (1999). Absent transmission system control by an independent entity, FERC correctly concludes that a transmission owner that also participates in the wholesale generation market has great incentive and opportunity to disadvantage generation competitors without such control.

The PJM ISO control area is expanding, increasing the size of the Mid-Atlantic regional market for wholesale electricity. The Allegheny Power System, which serves portions of

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[4] *Pennsylvania - New Jersey - Maryland Interconnection*, 81 F.E.R.C. ¶ 61,257 (1997), *order on clarification*, 82 F.E.R.C. ¶ 61,068 (1998), *order on reh'g*, 92 F.E.R.C. ¶ 61,782 (2000), *appealed sub nom Baltimore Gas and Electric Co. v. F.E.R.C.*, Case No. 00-1460 (CA District of Columbia) and *Public Service Electric and Gas Company v. F.E.R.C.*, Case No. 00-1457 (CA District of Columbia).

western Pennsylvania, Maryland, Ohio, Virginia and West Virginia has already announced plans to join PJM. *Allegheny Power System on behalf of Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, PJM Interconnection, L.L.C., Allegheny Power Service Corporation,* 95 F.E.R.C. ¶ 61,045 (2001). Duquesne Light Company has announced similar tentative plans to join PJM. *Duquesne Light Co.*, F.E.R.C. Docket No. RT01-13-000, *Status Report of Duquesne Light Company,* (December 5, 2000).

Thus, most of Pennsylvania is or will soon be served by an Independent System Operator which spans much of the Mid-Atlantic seacoast of the United States from New Jersey to Virginia, including the District of Columbia and seven States.

C. Parochial State Rules Which Burden the Operation of the Interstate Transmission Network Burden Interstate Commerce Present Obstacles To Congress's Plan For Wholesale Competition and Endanger the Reliability of the Interstate Transmission Network

New York's view is that any transaction, wholesale or retail, which begins and ends in a single State is wholly State jurisdictional regardless of its impact on the interstate transmission network. If that is true then there is no limit to a State's authority to give preference to such transactions over interstate commerce, even to the point of blocking such transactions entirely. "State" police powers are also exercised by political subdivisions of states, such as "utility districts" or municipal light and heating authorities. While such State political entities exercise "traditional police powers" they are also connected to the interstate grid. There is considerable scope for mischief in such a misreading of the Federal Power Act. A State or political subdivision located along a path of interstate transmission congestion or strategic importance

could, by preferential scheduling of power transactions, equipment outages or emergency operations, control a large portion of the interstate grid.

For example, PJM members are signatories to a number of agreements, including an Operating Agreement and a Reliability Agreement, which obligate PJM wholesale generation market participants, transmission owners, generation owners and local distribution companies to coordinate system operations, system outages, voltage reductions and load dumps in times of serious shortages. Such coordinated control and response is essential to transmission system security. Under New York's theory, any State (or political subdivision with transmission resources or control) could substitute its own judgment during a regional, multi-state emergency.

There is nothing hypothetical or speculative about such concerns. The City of Vernon, California filed a recent complaint with FERC asking it to relieve the City of the obligation to interrupt during times of California transmission system emergency declared by the California ISO. *City of Vernon, California v. California Independent System Operator,* F.E.R.C. Docket No. EL01- 75-000 (Complaint filed May 7, 2001). In its complaint, the City declares:

> It is widely reported that California is likely to suffer shortages of power supply this summer. Some projections are that as a result of such shortages blackouts will be required for 30 days or more. In the past, when the ISO system, or a portion of that system, was short of energy in real time, the ISO has imposed rotating blackouts that required all utilities to blackout a portion of their load on a pro rata basis with other utilities on the ISO system generally or on the particular affected portion of the system. Whether the particular utility was fully resourced or fully scheduled or not, was not taken into account . . . [T]he ISO's response to Vernon is that the failure or inability of other utilities to schedule sufficient supplies for their load, and the ISO's inability

> to makeup the shortfall with real time imbalance energy, constitutes a "system emergency". The ISO contends that under its tariff and various agreements to which Vernon is a party, Vernon and all other utilities in the affected area must curtail their customers' load on the same pro rata basis in such system emergencies . . .
>
> However, the present circumstances are not "system emergencies" within that meaning. The present circumstances are the results of choices made by or for the utilities that find themselves short of supply. They are not the result of some sudden and unexpected calamity.

City of Vernon, California v. California Independent System Operator, F.E.R.C. Docket No. EL01-75-000 (Complaint filed May 7, 2001) at 3-9.

The prospect of a California municipality sitting as a lighted island while its neighbors struggle in the darkness to cope with a chronic system emergency is a vision of chaos. The City of Vernon's demand would impair California's and the Western Interconnection's efforts to battle a serious regional shortage of electricity and transmission capacity and spark disputes which could lead to the fragmentation of the regional transmission grid. Indeed, the City's complaint is a harbinger of the future of the interstate transmission grid as New York would have it controlled under a system of fragmented jurisdiction.

Whatever the ultimate resolution of the *City of Vernon* complaint, FERC must assess the complaint's effect on reliability, 16 U.S.C. §824j (b), and its impact on the interstate transmission system, 16 U.S.C. §824k. FERC is obligated under the Federal Power Act to protect the reliability and integrity of the larger interstate transmission system as a whole, so as to protect the national public interest.

New York would put itself in FERC's place in resolving such disputes. New York claims a unilateral and seemingly unconstrained power, free of FERC review or jurisdiction, to "protect" a certain class of New York retail customers by running those portions of the New York transmission system it deems "intrastate". It would do so by carving out superior rights to facilities that are part of the interstate transmission system, to the detriment of neighboring regions. While New York is understandably vague on the details of how it would exercise this asserted power, the harm to interstate commerce is clear. There will be two classes of firm transmission service in New York: "Bundled Retail Firm" and "Interstate Commerce Firm". Interstate commerce will be less firm than New York's bundled retail load and the degree of burden upon interstate commerce will be at New York's behest.

Pennsylvania and other states which depend upon a well functioning wholesale transmission system and competitive wholesale generation market cannot avoid being disadvantaged by such a claim. With wholesale transactions frequently spanning states and regions, every State through which any portion of a transaction might flow could assert jurisdiction to regulate or impede it. Indeed, as electric energy does not flow directly from one point to another, but over many parallel pathways in the interstate transmission grid, nearly every wholesale power transaction in the Eastern Interconnection could conceivably come under New York's jurisdiction. *See North American Electric Reliability Council,* 85 F.E.R.C. ¶ 61,353 (1998).

The development and operation of regional independent system operators such as PJM is threatened as well. Pennsylvania regards such regional transmission organizations, which operate regional transmission grids under common control and market rules, as essential to well functioning wholesale and retail markets. With regional wholesale generation markets gradually increasing in size, it

is important that the interstate grid be protected against efforts to carve it up into many individual State grids with many and differing State transmission rules.

As discussed above, Congress intended to leave States with their existing retail ratemaking role. However, Congress also intended to create a vibrant wholesale transmission market by removing the previous monopoly utility control of the grid which excluded willing wholesale buyers and sellers of electric generation capacity.

The assertion by a State of a right to carve out and control transmission facilities connected to the interstate grid for the benefit of certain of its citizens is inimical to law, public policy and Congressional intent. New York's position is thus inconsistent with the Interstate Commerce Clause, the Federal Power Act and the Energy Policy Act of 1992.

On the other hand, the assertion of Enron Power Marketing, Inc. (Enron) in its brief that FERC should be compelled to extend its Open Access Transmission Tariff requirements to open up bundled retail sales to FERC jurisdiction is not supported by the record below, and is contrary to the intent of Congress that traditional State rate regulation of bundled electric service be permitted to continue. Should FERC conclude that a particular State statute or rule has exceeded state jurisdictional bounds by burdening interstate commerce or by creating undue discrimination against other wholesale customers dependent on the interstate grid, FERC has ample power to remedy such burden by order or rule.

CONCLUSION

The judgment of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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